



**Michael R. Diliberto, Esq.**



## **Indemnity. What's It Worth?**

Is a Code of Civil Procedure section 998 settlement offer that requires the plaintiffs to indemnify the defendants against potential future claims of nonparties valid? The answer is no, according to *Khosravan v. Chevron Corporation* (2021) 66 Cal.App.5th 288.

The Khosravans (husband and wife) sued Chevron and others for damages after Mr. Khosravan allegedly contracted mesothelioma while working at oil refinery facilities in Iran controlled by Chevron's predecessors. The Chevron defendants served the Khosravans with section 998 offers to waive defense costs in exchange for dismissing all claims with prejudice, and a "release of all future claims based on the allegations in the complaint, including . . . claims for wrongful death, *and indemnity in the event such claims are filed by non-parties to this case.*" (Italics added.) The Khosravans did not respond to the offers.

The Chevron defendants prevailed on summary judgment (Chevron owed no duty of care), and filed a memorandum of costs for approximately \$33,900. The Khosravans moved to strike or tax costs on several grounds, including that the Chevron defendants' statutory settlement offers were not capable of valuation because the offers required the Khosravans to indemnify the Chevron defendants against future claims by nonparties. The trial court awarded the Chevron defendants \$15,564 in total costs. Ms. Khosravan appealed. (Mr. Khosravan was deceased.) The Court of Appeal reversed the trial court's order denying the Khosravans' motion to strike or tax costs.

*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692 served as precedent. There, the plaintiff slipped and fell at a gas station and sued the station's owner. The owner made a 998 offer for entry of a \$15,000 judgment in exchange for the plaintiff releasing the owner, its attorneys, and its insurance carrier "from any and all claims and causes of action arising out of [plaintiff's] claims including insurance bad faith and violation of Insurance Code section 790.03." After a jury awarded Plaintiff \$9,750 (\$5,250 less than the statutory offer), the trial court granted the owner its costs under section 998. The Court of Appeal reversed, concluding the required release rendered the offer less favorable than the jury's award and difficult to quantify.

The court explained that the value of the term requiring the plaintiff to release unfiled claims against the owner, its insurance carrier, and its attorney may have exceeded the difference between the statutory offer's monetary value and the judgment obtained. Also, "[t]o pinpoint the value of the various potential unfiled claims [plaintiff] might have had at the time of the statutory offer or in the future against three different parties, only one of whom was even a party to the instant action, would require the court to engage in wild speculation bordering on psychic

prediction.” Given this uncertainty, “Neither this court nor the trial court can be expected to properly allocate defendant’s offer between the personal injury causes of action involved in the instant litigation and the several other causes of action [plaintiff] is being asked to surrender.”

Here, the court found a potentially high price tag on requiring the Khosravans to indemnify the Chevron defendants for claims not yet filed by third parties. The Chevron defendants would not have included the indemnification provisions if they had no value. Further, contrary to the Chevron defendants’ contention, even if nonparties were to bring only meritless claims, the Khosravans would still be liable for the costs of the Chevron defendants’ defense against these claims. (Civ. Code, § 2778, subds. 3 & 4.) Accordingly, the indemnification provisions in the Chevron defendants’ settlement offers, as in *Valentino*, would have required the Khosravans to evaluate a series of contingencies to determine the cost of indemnification for possible future claims of unidentified parties. The Chevron defendants provided no valuation for the likely expense of defending against potential claims, meritless or not.

Even if it were somehow possible to value the settlement offer, including the indemnification provisions, the Khosravans’ potential liability for indemnification (even if a future case could be resolved at the summary judgment stage) would far exceed the costs the Khosravans would owe absent the settlement, whether measured by the Chevron defendants’ request for \$33,900 in costs or the court’s award of \$15,500. Thus, the Chevron defendants failed to show the judgment was more favorable than their statutory settlement offers.

### **The Takeaway**

A term in a section 998 settlement offer requiring a plaintiff to indemnify a defendant against third party claims defies accurate valuation under the framework of *Valentino*. Benno B. Ashrafi, counsel for the Khosravans, noted that this decision underscores the requirement that the value of a 998 offer must be easily ascertainable. Chevron sought indemnification against any future wrongful death claims that might be filed by nonparties. The value of such an indemnification could not be determined, making it impossible for his clients to accept the offer. Peter A. Strotz, counsel for Chevron, observed that this case demonstrates the limitations of section 998 offers, which cannot be used to buy peace for prospective wrongful death actions.